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Real Reasons the Eastern District of Texas Draws Patent Cases—Beyond Lore and Anecdote

*By Andrei Iancu & Jay Chung**

INTRODUCTION

The Eastern District of Texas comprises the relatively sparsely populated areas of Beaumont, Lufkin, Marshall, Sherman, Texarkana, and Tyler.¹ The District presently has just eight district court judges, which pales in comparison to more heavily populated areas, such as the Central District of California, which has 35 judges.² It is not surprising that the largest judicial district, the Central District of California, is one of the most popular places to litigate a patent case.³ What is surprising, at least to non-patent practitioners, is that the Eastern District of Texas has become just as popular a location for patent cases.⁴ In fact, the Eastern District of Texas, along with the Central District of California, is perennially among the busiest patent dockets in the nation, although that has not always been the case.⁵ As recently as the period from 1995-1999, the Eastern District of Texas was not even among the top ten districts for patent cases.⁶ The District's rising popularity for patent cases has been a source of consistent marvel in legal and non-legal communities

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1. See United States District Court, Eastern District of Texas, <http://www.txed.uscourts.gov/page1.shtml?location=info> (last visited April 5, 2011).
2. See FAQs about Judges' Procedures and Schedules, <http://www.cacd.uscourts.gov/CACD/JudgeReq.nsf/FAQs+about+Judges%27+Procedures+and+Schedules> (last visited April 5, 2011).
3. For example, there were 285 patent cases filed and 267 patent cases pending in the Central District of California during the twelve-month period ending September 30, 2009. Judicial Business of the U.S. Courts, at Table C-11, U.S. District Courts—Intellectual Property Cases, Securities/Commodities/Exchanges Cases, and Bankruptcy Appeals Filed, Terminated, and Pending During the 12-Month Period Ending September 30, 2009 (*available at* <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C11Sep09.pdf>) (last visited April 5, 2011).
4. For example, there were 242 patent cases filed and 446 patent cases pending in the Eastern District of Texas during the twelve-month period ending September 30, 2009. *Id.*
5. See *id.*
6. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 558, 571 (Aug. 2001); data in the chart are from Federal Judicial Caseload Statistics,

alike, giving rise to usually undeserved yet frequent criticism based mostly on lore and anecdote. The primary target for the criticism has been the “East Texas jury,” which is frequently accused of being unsophisticated and predisposed to find for plaintiffs.⁷

This article discusses some of the real reasons the Eastern District of Texas has become popular for patent cases, including the District’s characteristics that distinguish it from other districts and the nation in general. We look at various statistics from the District and compare them with other popular patent venues. We conclude that there is little evidence that the District’s popularity arises primarily from its jury pool. Instead, there is a confluence of factors that combine to render a much more satisfactory explanation.

Part I of this article discusses the popular perception and image of the Eastern District of Texas as a venue that provides plaintiffs with an unfair advantage, reasons why such a perception may be inaccurate, and explores why popular explanations for the perception are unsatisfactory. Part II compares statistics from various districts with those of the Eastern District, and explains why the perception of unfairness and inaccuracy in the District is overblown. Part III discusses various characteristics of the Eastern District that make it attractive for patent litigation.

I. PERCEPTION AND IMAGE OF THE EASTERN DISTRICT OF TEXAS

Because of its meteoric rise in popularity, the Eastern District of Texas has garnered national attention and reputation—not all of which is flattering. Supreme Court Justice Antonin Scalia called the District a “renegade jurisdiction.”⁸ The District has also been called “a haven for patent pirates”⁹ by the popular press, as well as “a hotbed for ‘patent trolls’”¹⁰ and “a plaintiff’s best bet”¹¹ by legal news outlets. According to Southern Methodist Univer-

available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>.

7. Yan Leychikis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 210–15 (2007).
8. *See Small Town Attracts High Stakes IP Case*, INSIDE COUNSEL, Jul. 1, 2006, available at <http://www.insidecounsel.com/Issues/2006/July%202006/Pages/Small-Town-Attracts-High-Stakes-IP-Case.aspx>.
9. Sam Williams, *A Haven for Patent Pirates*, TECHNOLOGY REVIEW, (Feb. 3, 2006), available at http://www.technologyreview.com/printer_friendly_article.aspx?id=16280.
10. Peter Lattman, *Patent Trolls: Grazing the Piney Woods?*, WALL ST. J. L. BLOG, (Mar. 27, 2006), available at <http://blogs.wsj.com/law/2006/03/27/are-patent-trolls-grazing-the-east-texas-plains/>.
11. Marius Meland, *Eastern District of Texas: A Plaintiff’s Best Bet*, LAW360, (Dec. 9, 2005), available at <http://www.law360.com/web/articles/4738>.

sity Dedman School of Law Professor Xuan-Thao Nguyen, “the district’s reputation as friendly to patent plaintiffs is widespread”¹² and “[t]here’s always chuckling” when the District is mentioned, further noting that “the district’s reputation isn’t deserved.”¹³ One of the oft-cited reasons for the District’s popularity, as well as its undeserved reputation, has been the allegedly “plaintiff-friendly juries”¹⁴ who are “predisposed to find for plaintiffs and award large damages.”¹⁵ Patent litigators’ perception of the East Texas jury is evident from the percentage of cases in which a jury is demanded.

District	Jury Demanded ¹⁶
<i>E.D. Texas</i>	96.2%
C.D. California	86.7%
N.D. California	89.0%
D. Delaware	74.7%
M.D. Florida	81.1%
N.D. Illinois	85.7%
D. Minnesota	39.5%
D. New Jersey	57.8%
S.D. New York	68.4%
E.D. Virginia	85.0%
W.D. Wisconsin	39.1%

In an attempt to explain this alleged jury bias in the Eastern District of Texas, legal observers often point to the seemingly indisputable evidence of

12. Eric Torbenson, *Dallas Firms Specialize in Tricky, Lucrative Terrain of Patent Law*, DALLAS MORNING NEWS, Jan. 30, 2010, available at <http://www.dallasnews.com/business/headlines/20100130-Dallas-firms-specialize-in-tricky-6799.ece>.
13. *Id.*
14. Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, (Sept. 24, 2006), available at http://www.nytimes.com/2006/09/24/business/24ward.html?_r=4&oref=slogin&ref=technology&pagewanted=all (“What’s behind the rush to file patent lawsuits here? A combination of quick trials and plaintiff-friendly juries, many lawyers say.”).
15. Julie Blackman, et al., *East Texas Jurors and Patent Litigation*, AM. SOC’Y OF TRIAL CONSULTANTS, (Mar. 2010), available at <http://www.astcweb.org/public/publication/documents/BlackmanetalTJEMarch2010.pdf>.
16. LegalMetric, <http://www.legalmetric.com/> (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis. from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.).

the patentees' allegedly high patentee win rate in jury trials.¹⁷ In fact, at the recent symposium on the Eastern District of Texas held at Southern Methodist University Dedman School of Law, the panel that gave rise to this paper was entitled, "The Jury in the EDTX: Unsophisticated American Peers or Idealists of Property Rights in Patents?" Neither explanation suffices.

A. Common Explanations for the Alleged Jury Bias

There are some common—and perhaps superficially plausible—explanations for the jury bias allegedly unique or special to the Eastern District of Texas. One explanation is that East Texas jurors have a great respect for the government.¹⁸ The logic here is that patents are issued by the United States Patent and Trademark Office—a government entity—and therefore, the local jury is loath to overturn this government.¹⁹ In other words, the perception is that East Texas juries have a rigid and steadfast understanding of the presumption of patent validity.²⁰

Another explanation is that the East Texans have a general distrust of large corporations.²¹ Legal observers reason that this is because there are relatively few large corporations based in East Texas, and corporations accordingly are "likely to be viewed with more suspicion in East Texas than they are in places like New York, Delaware, or even Dallas."²² There is even a story that allegedly supports this theory: "The distrust of corporate defendants goes back many decades to the time when the District was a major railroad center, which resulted in many personal injury claims against large railroad companies."²³

A third explanation is that East Texans "tend to be strong believers in property rights."²⁴ The lore is that this alleged tendency arises from "[t]he townspeople, who are accustomed to fighting with oil companies over royal-

17. See, e.g., Creswell, *supra* note 14; see also Yan Leychkis, *supra* note 7, at 210.

18. Leychkis, *supra* note 7, at 213.

19. See Susan Decker, *Texas District is Heaven for Patent Holders Under Siege*, SEATTLE TIMES, May 1, 2006, ("I think the people in this part of the world still trust their government, and they think the role of the government is to protect their property . . . When you say a patent is presumed to be valid because it's been issued by the U.S. Patent and Trademark Office, and it's got that big red-and-gold seal, that means something.") (quoting Judge T. John Ward) available at http://seattletimes.nwsources.com/html/business/technology/2002963706_bt_patentheaven01.html (last visited Mar. 23, 2011).

20. Leychkis, *supra* note 7, at 214.

21. Blackman, *supra* note 15, at 7.

22. *Id.*

23. Leychkis, *supra* note 7, at 214.

24. Nate Raymond, *Taming Texas*, AMERICAN LAWYER, Mar. 1, 2008.

ties for their mineral rights.”²⁵ As a corollary, some legal observers believe that East Texans “view patents in much the same way as they view real property.”²⁶ This tendency allegedly helps patentees because, “[f]ramed in this fashion, any patent infringement dispute can be distilled to a simple trespass action, and any invalidity defense can be viewed as a claim of defective title—terms that can be easily understood even by an unsophisticated small town juror.”²⁷ Using this analogy, commentators have suggested that painting a non-practicing patentee as a “patent troll” has little negative effect in East Texas, as a land owner has the right to do anything (within legal limits) with her land, including using and building on the land, leasing it out, or doing nothing at all.²⁸

Other explanations attempt to use demographic information to “prove” the purported jury bias. One oft-cited trait is “a generally older population of jurors in most East Texas counties.”²⁹ Commentators note that this means “jurors are coming to technology cases with less experience with complex technology than in other, younger venues.”³⁰ Another commonly cited trait is that “jurors are relatively uneducated.”³¹ Commentators note that the college graduation rate is 15-20 percent in East Texas, compared with cities “like Boston, where more than 40 percent of the jury pool holds at least a bachelor’s degree.”³² There have even been reports of “bloggers and others talk[ing] about patent holders rushing to Texas because of the ‘stupid people in Texas, ignorant people in Texas.’”³³ Such inflammatory statements appear to have no sound bases.

B. The Common Explanations Are Not Satisfactory

The various common explanations for the alleged jury bias specific to the Eastern District of Texas may seem plausible on their face. But after more thorough research, they often appear to be based on mere anecdotes. Due to the lack of reliable data, more research is warranted to validate any purported jury bias specific to East Texas. Indeed, past empirical research

25. *Id.*

26. Leychkis, *supra* note 7, at 213.

27. *Id.*

28. *Id.*

29. Blackman, *supra* note 15, at 97 (discussing backlash arising from such statements, and further stating that “it will be important to show your respect for East Texas jurors’ ability to wrestle with and comprehend your case.”).

30. *Id.*

31. *Id.*

32. *Id.*; Raymond, *supra* note 24.

33. Blackman, *supra* note 15, at 9.

regarding jury behavior indicates that commonly held beliefs are often inaccurate when measured statistically.³⁴

For example, the explanation regarding the age and education level of East Texas jurors is particularly unsatisfactory. This is because it is unclear how the jurors' age or education levels translated into an advantage for the patentee. Although there are anecdotal accounts of instances where the successful plaintiffs' lawyers have presented their cases in a simple, non-technical manner compared to the defendants' lawyers, it is still unclear how the jurors' age or education levels translates into an advantage for the patentee.³⁵ There are empirical studies that have found "little robust evidence that a trial locale's population demographics help explain jury trial outcomes."³⁶

Further, the explanation that a patentee is more likely to win because an East Texas jury has a special distrust of corporations is similarly suspect. As an initial matter, "most patent litigation is corporation versus corporation (85%)."³⁷ According to Federal Circuit Judge Kimberly Moore's empirical study, juries in general, not just in East Texas, are "more likely to find for individuals in patent cases."³⁸ Judge Moore states:

There is ample evidence to suggest that society holds inventors in high regard. "In the popular imagination, the hero of the patent world is the solo inventor—an eccentric individual who has a brilliant insight, obtains a patent and proceeds to fame and fortune by making and selling the patented invention." . . . These empirical results affirm the popular notion that juries love inventors and support the conclusion that juries prefer individuals.³⁹

There appears to be no robust evidence that East Texans are any more inclined to be in favor of the individual (or the underdog) and against the corporations than the general public.

II. OVERBLOWN PERCEPTION OF UNFAIRNESS IN THE EASTERN DISTRICT OF TEXAS

As noted above, there is a public perception and suggestion of unfairness and inaccuracy in Eastern District of Texas. For instance, one commen-

34. See, e.g., Theodore Eisenberg, et al., *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839 (2002).

35. Raymond, *supra* note 24.

36. Eisenberg, *supra* note 34. The Eisenberg study focused on the race and poverty characteristics of jurors in over 30,000 federal and state tort trials.

37. The Honorable Kimberly A. Moore, *Populism and Patents*, 82 N.Y.U. L. REV. 69, 106 (Apr. 2007).

38. *Id.* at 107.

39. *Id.* at 106, 110 (quoting Robert Patrick Merges & John Fitzgerald Duffy, PATENT LAW AND POLICY: CASES AND MATERIALS 1255 (3d ed. 2002)).

tator notes, “quite plainly, an Eastern District jury is the patentee plaintiff’s best friend.”⁴⁰ But before reaching such categorical conclusions, a hard-nosed statistical study should be performed after a sufficiently large number of trials have been held in the District. At the very minimum, certain threshold questions must be answered. Do East Texas juries actually render results that are out of the ordinary as compared to other districts? Are the results from East Texas less reliable than those from other districts? As it turns out, trial results in recent years indicate that the answer to both questions is “no.”

A. Patentee Win Rates

It is no secret that patentees prefer jury trials. On, average patentees win jury trials at a high rate nationally, not just in the Eastern District of Texas; the historical rate is approximately 68% nationally.⁴¹ The patentee win rate for the Eastern District of Texas through November 2010 is not far off, at 73%.⁴² Patentees in other popular districts may fare just as well or even better in jury trials:

District	Jury Trial Win Rate ⁴³
<i>E.D. Texas</i>	73%
C.D. California	73%
N.D. California	66%
D. Delaware	61%
M.D. Florida	77%
N.D. Illinois	74%
D. Minnesota	65%
D. New Jersey	64%
S.D. New York	53%
E.D. Virginia	79%
W.D. Wisconsin	71%

40. Leychkis, *supra* note 7, at 210.

41. Leychkis, *supra* note 7, at 211; Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 386 (2000); *see also* Moore, *supra* note 36, at 82.

42. LegalMetric (from Jan. 1991 to Nov. 2010). It is worth noting that a Price Waterhouse Coopers study pegs Eastern District of Texas “trial success rate” at 66.7% compared to overall average of 66.0% for data from 1995 to 2009. Chris Barry, et al., *The Continued Evolution of Patent Damages Law*, Price-WaterhouseCoopers 2010 Patent Litigation Study available at <http://www.pwc.com/us/en/forensic-services/publications/assets/2010-patent-litigation-study.pdf>.

43. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis.; from Jan. 1991 to

For instance, juries in more urban and heavily populated districts, such as the Central District of California (primarily Los Angeles) and the Northern District of Illinois (Chicago), appear to favor the patentee at least as much or even more so than the juries in East Texas—debunking the popular notion that East Texas juries have an unusual affinity to find in favor of the patentee. Indeed, some of the highest win rates are in the smaller districts such as the Middle District of Florida (Orlando, Tampa) and the Eastern District of Virginia (Alexandria, Richmond, Norfolk).

Moreover, because the district figures only a fraction of patent cases actually get resolved through jury trial (“on average only 2.8% of patent cases go to trial” nationally⁴⁴), the district figures are based on a rather small number of cases.⁴⁵ The 73% win rate figure in the Eastern District of Texas is based on just 52 jury trials that reportedly occurred from 1991 to 2010.⁴⁶ As such, the win rate may change materially based on relatively few additional cases. It seems too early to conclude, with a statistically satisfactory level of accuracy, that an East Texas jury will favor a patentee. Additionally, this means it is premature to conclude that there is a “problem” with East Texas juries.

B. Appellate Affirmance Rate

As shown previously, there appears to be no conclusive evidence that East Texas juries are much more of a “friend” to a patentee than the national average. It is worth looking into the appellate affirmance rate of patent cases from among the Eastern District of Texas compared to other districts, because this may provide some insight into the accuracy of court rulings and jury verdicts in East Texas as compared to the rest of the country.

Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.).

44. Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 4, 14 (Fall 2010).

45. *Id.*

46. LegalMetric (from Jan. 1991 to Nov. 2010).

District	Complete Affirmance ⁴⁷
<i>E.D. Texas</i>	61.0%
C.D. California	52.2%
N.D. California	65.3%
D. Delaware	52.2%
M.D. Florida	46.4%
N.D. Illinois	56.0%
D. Minnesota	60.6%
D. New Jersey	64.8%
S.D. New York	64.4%
E.D. Virginia	51.7%
W.D. Wisconsin	65.1%

The national average Federal Circuit affirmance-in-full rate for patent cases over the past ten years ranged from approximately 47% to 60%.⁴⁸ In contrast to popular perception of unusual bias in East Texas, some may find it surprising to learn that the complete affirmance rate of patent cases from that District is actually higher than many other popular patent districts, and a bit higher than the national average.⁴⁹

Likewise, East Texas fares well compared to other districts and nationally in the percentage of cases that have been affirmed at least in part:

47. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis.; from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.).

48. Federal Circuit Statistics, *available at* http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_Patent_Infringement_Affirmance_and_Reversal_Rates_2001-2010.pdf.

49. As a caveat, each district's figures are based on a rather small number of cases (much like the number of jury trials) that get appealed and are ruled on. The Eastern District of Texas affirmance rate figure is based on 59 cases that were reported by LegalMetric between 1991 and 2010. LegalMetric (Jan. 1991 to Nov. 2010).

District	Affirmed At Least In Part ⁵⁰
<i>E.D. Texas</i>	84.7%
C.D. California	73.0%
N.D. California	84.0%
D. Delaware	82.6%
M.D. Florida	71.4%
N.D. Illinois	76.7%
D. Minnesota	85.9%
D. New Jersey	77.5%
S.D. New York	77.8%
E.D. Virginia	85.0%
W.D. Wisconsin	88.4%

The data suggests that the Eastern District of Texas decisions are at least as accurate as other districts, if not more accurate.⁵¹

III. REAL FACTORS THAT HAVE DRAWN PATENT CASES

True enough, East Texas is a popular patent venue. But this popularity is not based on the nefarious perceptions generated by common lore. Specifically, the presence of local patent rules, judges well versed in patent litigation, and a relatively quick docket mean that a patent case can often be resolved more efficiently and effectively in the Eastern District of Texas than in many other districts. Plus, it is more likely that a case will get to the jury in East Texas.

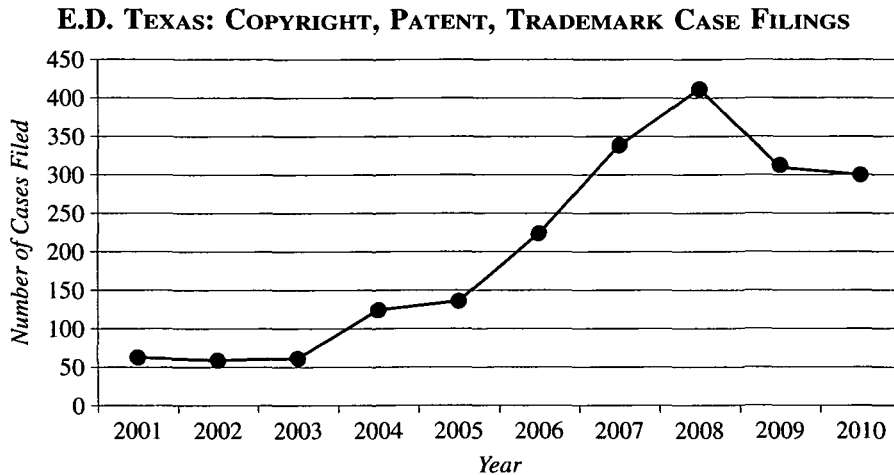
A. Local Patent Rules

Local patent rules, such as the ones adopted in the Eastern District of Texas, typically provide for a default schedule for certain patent disclosures (e.g., infringement contentions and invalidity contentions) and a claim con-

50. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis.; from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.).

51. Of course, just because a district-court decision was affirmed does not necessarily prove accuracy or mean that the decision was “accurate,” particularly in light of the deferential standard of appellate review of factual issues. The affirmance rate, however, at least *indicates* accuracy—especially when used comparatively between districts. Importantly, we have seen no statistical information to the contrary that the accuracy of the Eastern District of Texas is inferior.

struction procedure.⁵² Certain judges in Eastern Texas adopted local patent rules in 2001, and in 2005 the entire district adopted local patent rules.⁵³ The adoption of patent rules coincides with the rise of patent case filings in East Texas, as shown by the chart below:⁵⁴



While some have argued that the patent rules generally favor the patentee, the rules actually promote the certainty of process and effective management of patent disputes, thus helping both sides. For example, the patent rules require the patentee to disclose its infringement contentions (typically claim charts) to the accused infringer by a certain date, benefiting the accused infringer.⁵⁵ The patent rules also provide for a structured claim-construction proceeding fairly early in the case, including the exchange of proposed claim terms and claim elements.⁵⁶ This structure helps both sides effectively manage a complex process. The Eastern District of Texas—along with the Northern District of California—has been a trailblazer in setting out and implementing local patent rules, thus improving the structure and predictability of patent litigation.

52. P. R. 3 (E.D. Tex. Patent Rules 2010).

53. See Brian E. Mitchell, et al. *Comparison of the Most Popular Patent Venues*, LAW360, (Dec. 10, 2009) available at <http://www.law360.com/articles/137614>. It is worth noting that other districts have local patent rules, including Northern District of California, Southern District of California, Northern District of Illinois, District of New Jersey, Northern District of Georgia, Eastern District of Missouri, and Western District of Pennsylvania.

54. See Federal Judicial Caseload Statistics, available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>.

55. P. R. 3 (E.D. Tex. Patent Rules 2010).

56. *Id.*

B. Experienced Judges

The judges in the Eastern District of Texas are some of the most experienced adjudicators and administrators of patent cases in the country. This is evident from the average number of patent cases the judges in the District have handled over the years as compared to some other districts. Judges in the Eastern District have seen more patent cases on average than judges in any other district, with the exception of Delaware. This includes judges in such popular patent districts as the Central and Northern Districts of California, and many others.

District	Average Patent Cases Per Active Judge ⁵⁷
<i>E.D. Texas</i>	124
C.D. California	58
N.D. California	81
D. Delaware	312
M.D. Florida	22
N.D. Illinois	60
D. Minnesota	62
D. New Jersey	43
S.D. New York	28
E.D. Virginia	30
W.D. Wisconsin	108

Further, the average numbers do not tell the whole story regarding the patent experience of certain East Texas judges who hear most patent cases. For example, although the average figures above are from 1991 to 2010, the number of patent cases for the Eastern District of Texas is largely from the past 10 years, when the District experienced its meteoric rise in popularity as a patent venue destination.⁵⁸ Also, the average numbers reported for East Texas are conservatively low because there are some East Texas judges who historically do not hear any patent cases, pursuant to the District's case as-

57. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis.; from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.)

58. *Id.* In comparison, the District of Delaware has been a popular venue for patent cases for a longer period of time. See Moore, *supra* note 6 (listing the District of Delaware as the sixth most popular patent district for 1995-1999; the Eastern District of Texas was not one of the top ten popular districts); see also Lemley, *supra* note 44 (listing the District of Delaware as sixth most popular patent district for 2000-2010).

signment rules.⁵⁹ Examining only the judges who currently hear most patent cases reveals their very significant patent experience: East Texas Judge T. John Ward has had 689 patent cases, Judge Leonard Davis has had 534 patent cases, and Chief Judge David Folsom has had 347 patent cases, up to 2010.⁶⁰ This deep patent experience helps promote judicial efficiency and predictability. Texas judges are familiar with issues that commonly arise in patent litigation, such as the legal standard for claim construction. Among other benefits, this means that basic issues need not be litigated and rehashed in every case.⁶¹

C. Case Assignment

Predictability is important to any litigant, and it can reduce costs of litigation and promote judicial efficiency. Which judge gets assigned to a case is one of the more important factors to that end. This type of predictability, however, can be hard to achieve in most districts. There may be considerable differences in tendencies and practice among different judges, even within a single district. For example, in the Central District of California, the average summary-judgment win rate among judges (who had at least ten summary judgment motions) ranged from as low as 10% to as high as 75%.⁶² Thus, there may be incentives for plaintiffs to attempt to “judge shop.” But in the Central District of California—as well as in some other popular patent venues—cases are assigned randomly to any one of the judges in the district, making any such attempt futile.⁶³

Case assignments are not as random in the Eastern District of Texas, increasing the level of predictability in the District. Plaintiffs can provide themselves with a significantly high probability of having their cases assigned to a particular judge in the Eastern District of Texas by choosing to file in one division of the District over another.⁶⁴ For example, a plaintiff filing a civil case in Texarkana has a 90% chance of drawing Chief Judge

59. *See, infra* Section III.C.

60. LegalMetric (Jan. 1991 to Nov. 2010). Compare the patent experience of Judges Ward, Davis, and Folsom with the three Delaware judges who has had the most patent cases, Judge Sue Robinson with 571 patent cases, Chief Judge Gregory Sleet with 525 patent cases, and Judge Leonard Stark with 123 patent cases up to 2010. LegalMetric (Jan. 1991 to Oct. 2010).

61. It is worth noting that there appears to be no evidence of judicial bias in the Eastern District of Texas in favor of the patentee. For example, the accused infringer won three of the five patent bench trials reported in LegalMetric between 1991 and 2010. LegalMetric (from Jan. 1991 to Nov. 2010).

62. LegalMetric (from Jan. 1991 to Oct. 2010).

63. C.D. Cal. General Order No. 08-05 (Apr. 17, 2008); *see also* N.D. Cal. General Order No. 44 (Jan. 4, 2010).

64. E.D. Tex. General Order 9-20 (Dec. 17, 2009).

David Folsom.⁶⁵ A plaintiff filing a civil case in Marshall has a 75% chance of drawing Judge T. John Ward, and filing a patent case in Tyler gives a plaintiff a 95% chance of drawing Judge Leonard Davis.⁶⁶ The assignment scheme also prevents certain judges—Judge Thad Heartfield and Judge Marcia Crone—from getting any patent cases.⁶⁷ Judges Davis, Folsom and Ward, as discussed above, have each developed significant patent experience and expertise.⁶⁸

The United States Congress arguably recognized some of the benefits of such a system when, in late 2010, it passed H.R. 628 “[t]o establish a pilot program in certain United States district courts to encourage enhancement of expertise in patent cases among district judges.”⁶⁹ This bill provides the Director of the Administrative Office of the United States Courts to designate at least six districts for a pilot program.⁷⁰ The judges within those districts can, in turn, request to be designated to hear patent cases.⁷¹ The cases within the district are randomly assigned as usual, but a judge not designated to hear patent cases has the option of declining to accept any patent case that randomly gets assigned to him or her.⁷² If so, the case would be assigned to one of the designated judges who requested to hear patent cases.⁷³

This new law has the potential to spread the somewhat predictable case assignment scheme of the Eastern District of Texas to other districts that are designated to participate in the pilot program. Although doing so may provide a potential for abuse, there are benefits to such a system, as Congress has apparently recognized by passing the law. Giving patent cases to judges who want them would lead to a system with judges who have expertise in patent law, much like the judges in the Eastern District of Texas. This may potentially increase the efficiency and accuracy in resolution of patent cases. In addition, concentrating patent cases in a smaller subset of judges who are happy to handle them would promote a more uniform application of the law—increasing the predictability of litigation for plaintiffs and defendants alike.⁷⁴ Predictability of process is one important reason that has attracted patent cases to East Texas. Again, this is something worth analyzing for its many potential benefits.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See supra* Section III.B.

69. H.R. 628, 111th Cong. (2010) (enacted Jan. 4, 2011)).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. This is a similar effect that was envisioned to arise if “specialized trial courts” were created to handle patent cases. *See Moore, supra* note 6, at 597.

D. Time to Resolution

A district's reputation as a "rocket docket" may attract patentee-plaintiffs. This is, at least in part, because a patent is a time-limited asset that expires, in general, within 20 years from filing.⁷⁵ The faster a patentee can establish infringement, the faster the patentee can hope to enforce exclusive rights via an injunction, and therefore enforce those rights for a longer period of time. However, a faster docket time is not necessarily bad for the accused infringer, as those with limited resources may benefit from the faster resolution of litigation.⁷⁶

As it can be seen from the table below, the Eastern District of Texas historically has had a relatively quicker time to jury verdict than many other popular patent districts. It has not been, however, the fastest.

District	Time To Jury Verdict ⁷⁷
<i>E.D. Texas</i>	28.9 months
C.D. California	35.3 months
N.D. California	37.3 months
D. Delaware	37.8 months
M.D. Florida	24.7 months
N.D. Illinois	32.3 months
D. Minnesota	33.5 months
D. New Jersey	56.1 months
S.D. New York	49.8 months
E.D. Virginia	12.0 months
W.D. Wisconsin	13.0 months

Commentators have attributed the relatively quick resolution of patent cases in the Eastern District to various factors. For example, one explanation is that East Texas generally has an older population, which leads to a smaller criminal docket, which in turn means courts have more bandwidth to handle civil matters, including patent matters.⁷⁸ Another explanation is the passage of a Texas law in 2003 imposing a cap on non-economic damages in health care liability actions, which led to a drop in medical-malpractice cases, which

75. See 35 U.S.C. § 154(a)(2).

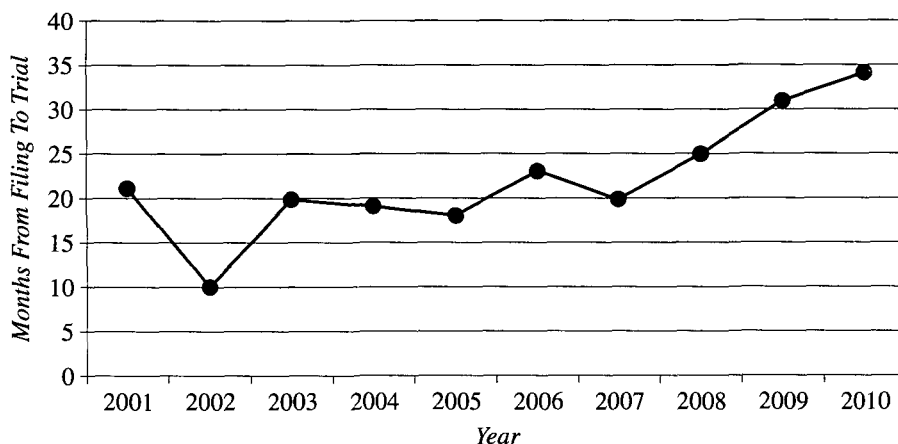
76. See Lemley, *supra* note 44, at 4.

77. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis., from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.).

78. See, e.g., Leychkis, *supra* note 7, at 209.

in turn means more time for courts to handle other cases.⁷⁹ Whatever the reason is or was for the relatively short time to trial of East Texas patent cases, it appears that there has been a steady rise in that average time to trial, which is not surprising given the deluge of patent cases filed in the District.⁸⁰ It remains to be seen whether the slowing down of the East Texas docket will lead patentees to file their cases elsewhere. In any event, a district's efficiency and speed of dispute resolution is not something to criticize.

E.D. TEXAS AVERAGE TIME TO TRIAL (PATENT CASES)



E. Venue-Transfer Win Rate

The venue-transfer win rate is an important consideration for the patentee before filing a case. The venue-transfer win rate may provide insight into whether the case will remain with the plaintiff's chosen forum or get transferred to a different one, largely chosen by the transferee-defendant. As the table below shows, the Eastern District of Texas has historically had among the lowest venue-transfer win rates.

79. *Id.* at 209–210.

80. The underlying data for the graph below regarding average time to trial is from LegalMetric.

District	Number of Venue-Transfer Motions	Venue-Transfer Win Rate ⁸¹
<i>E.D. Texas</i>	543	34.5%
C.D. California	288	53.0%
N.D. California	247	48.8%
D. Delaware	169	35.8%
M.D. Florida	135	42.7%
N.D. Illinois	340	56.2%
D. Minnesota	132	32.4%
D. New Jersey	110	57.4%
S.D. New York	148	69.1%
E.D. Virginia	257	56.1%
W.D. Wisconsin	93	47.1%

The low transfer win rate in East Texas should be read in the context of the number of venue-transfer motions that are filed in each district, as well as the public perception behind the Eastern District. As the statistics show, the Eastern District generates a lot more venue-transfer motions than other districts. For example, almost twice as many venue-transfer motions were filed in the Eastern District of Texas than in the Central District of California, which competes with East Texas for the top spot as the most popular district for patent litigation. One possible explanation is the perception of the Eastern District of Texas as particularly plaintiff biased, precipitating accused infringers to attempt to transfer venue more often. This popular perception may lead defendants to file weak venue-transfer motions in East Texas when they would not do so in other districts. To the extent this can be measured, filings of weaker venue-transfer motions in the Eastern District of Texas may help explain the low venue-transfer win rate.

These numbers may change in light of recent case law in the Fifth Circuit (where East Texas is located), as well as the Federal Circuit's application of this law. In a 2008 case unrelated to patent law, the Fifth Circuit granted a writ of mandamus transferring the case out of the Eastern District.⁸² Since then, the Federal Circuit has followed suit, granting writs of mandamus—which require a showing of a “clear and indisputable” right⁸³—in no less

81. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis.; from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.)

82. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008).

83. *Id.* at 311 (citing *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (D.C. Cir. 2004)).

than seven patent cases, transferring them out of East Texas.⁸⁴ It is too early—and uncertain—to predict the implications and exact effect this development may have to the venue-transfer win rates and to the popularity of patent cases in East Texas. One possible, and perhaps likely, scenario is that more cases will be transferred out of East Texas.⁸⁵ As a result, East Texas may decline in popularity, as plaintiffs may be less inclined to initiate a lawsuit in a venue that will transfer a case to a different district of the defendant's choosing. Only time will tell whether this proves to be the case.

F. Motion-for-Summary-Judgment Win Rate

The East Texas judges' disfavor for granting summary judgments is also factor that has been cited for why patentees favor filing in the Eastern District of Texas.⁸⁶ As the table below shows, the Eastern District of Texas has a relatively low summary-judgment win rate as compared to other districts. In fact, Judge T. John Ward, who has the most patent cases among the judges in East Texas, has expressed his preference to deny summary judgment and let the jury decide cases.⁸⁷

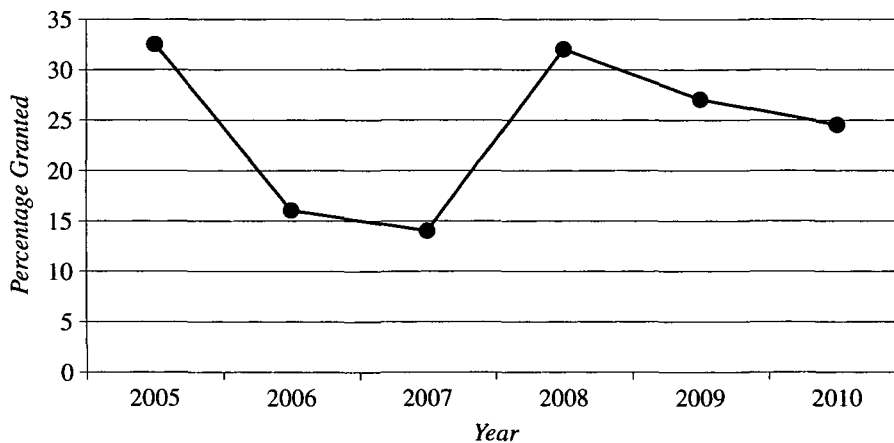
84. *In re* TS Tech. USA Corp., 551 F.3d 1315 (Fed. Cir. 2008); *In re* Genentech, Inc., 566 F.3d 1338 (Fed. Cir. 2009); *In re* Hoffmann-La Roche Inc., 587 F.3d 1333 (Fed. Cir. 2009); *In re* Nintendo Co., 589 F.3d 1194 (Fed. Cir. 2009); *In re* Zimmer Holdings, Inc., 609 F.3d 1378 (Fed. Cir. 2010); *In re* Acer Am. Corp., 626 F.3d 1252 (Fed. Cir. 2010); *In re* Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011).

85. However, this may or may not impact the venue-transfer-motion win rate, as it is possible that a filing of venue-transfer motion may become even more frequent, lowering the proportion of motions that truly have merit.

86. See Blackman, *supra* note 15, at 6.

87. See Raymond, *supra* note 24. ("Most of the time we feel like there are fact questions . . . I don't strain to get a summary judgment if I believe there's a fact question." (quoting Judge Ward)).

District	Motion-for-Summary-Judgment Win Rate ⁸⁸
<i>E.D. Texas</i>	26.2%
C.D. California	48.2%
N.D. California	45.0%
D. Delaware	32.0%
M.D. Florida	28.4%
N.D. Illinois	38.1%
D. Minnesota	39.4%
D. New Jersey	39.8%
S.D. New York	44.5%
E.D. Virginia	36.3%
W.D. Wisconsin	55.3%

E.D. TEXAS: MSJ WIN RATE

However, there appears to be no clear trend in the summary-judgment win rate in the Eastern District of Texas over the last few years.⁸⁹ The win rate has fluctuated between a little over 30% to a little under 15%.

Denying summary judgment is not inherently unfair or wrong, although in general, granting of summary judgment motions favors the accused infringer, who is more inclined to bring them. Among other things, the case will typically proceed to trial after a summary-judgment motion is denied, unless the parties settle. As discussed above, juries across the nation favor

88. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis.; from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.).

89. LegalMetric (2005-2010).

the patentee 68% of the time.⁹⁰ With such a low summary-judgment grant rate, it is no surprise that a higher percentage of cases get to trial in the Eastern District of Texas than in many other districts. For example, Professor Mark Lemley's research indicates that during the 2000 to 2010 time frame the Eastern District of Texas had the second highest proportion of patent cases going to trial, with 8%, compared to 2.8% nationally.⁹¹ A combination of low summary-judgment win rates and high proportion of cases going to trial favors the patentee on average, yielding a high overall contested win rate in the Eastern District of Texas.⁹²

District	Contested Win Rate ⁹³
<i>E.D. Texas</i>	43.0%
C.D. California	20.7%
N.D. California	18.0%
D. Delaware	39.7%
M.D. Florida	42.9%
N.D. Illinois	23.4%
D. Minnesota	29.3%
D. New Jersey	34.8%
S.D. New York	23.1%
E.D. Virginia	31.1%
W.D. Wisconsin	33.3%

90. See *supra* Part II.A.

91. Lemley, *supra* note 44, at 12 (stating there may be other factors that lead to a high percentage of cases going to trial than merely low summary-judgment win rate). For example, the Western District of Wisconsin, which had a relatively high summary-judgment win rate according to LegalMetric (data from 1991-2010), nevertheless had a relatively high percentage of cases going to trial according to Professor Lemley (data from 2000-2010)).

92. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis.; from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.); see also Lemley, *supra* note 44, at 8-9 (showing Lemley's research of cases from 2000 to 2010 indicating that the Eastern District of Texas has sixth highest win rate, with 40.3%, among districts with 25 or more patent cases).

93. LegalMetric (from Jan. 1991 to Oct. 2010 for C.D. Cal., N.D. Cal., D. Del., M.D. Fla., N.D. Ill., D. Minn., E.D. Va., and W.D. Wis.; from Jan. 1991 to Nov. 2010 for E.D. Tex.; from Jan. 1991 to Apr. 2010 for D.N.J.; from Jan. 1991 to July 2010 for S.D.N.Y.) (showing contested win rates, including bench trials, jury verdicts, involuntary dismissals, judgments as a matter of law, and summary judgments, and excluding consent judgments and default judgments).

In the end, this overall win rate in East Texas may be a critical driver—and a shorthand explanation—for the District's popularity. This suggests that it is not the jury that is the primary driver for the perceived advantage for patent plaintiffs in East Texas. Conversely, juries there appear to render results that are in line with the rest of the country and other popular patent venues, as discussed above.⁹⁴ As we have seen, patentees everywhere fare better with juries, on average, than accused infringers do. Therefore, the difference may well be that, historically, East Texas cases have had a higher chance of making it to the jury in the first place. This does not mean that there is anything inherently wrong or unfair. Each summary-judgment motion is decided on its own, and it is hard to say without a detailed study whether the court was right in each case to let the jury decide issues that a litigant is at least theoretically entitled to present to a jury. But at least one indicator suggests that the Eastern District has not been out of line. As we have seen, the affirmance rate on appeal for cases from East Texas is, on average, as high or higher than those from other popular districts.⁹⁵

III. CONCLUSION

Due to its meteoric rise in popularity for litigating patent cases, the Eastern District of Texas has received its share of negative publicity stemming from alleged unfairness and bias of East Texas juries against an accused infringer. But statistics from recent cases indicate that the jury trial win rate in the Eastern District of Texas (73%) is not out of the ordinary from the national average (68%), and is in fact in line with many other popular districts. Further, because only a fraction of patent cases actually reach a jury verdict, the District's figure is based on relatively few cases (52 jury trials for the Eastern District of Texas), and that figure may change based on a few additional cases. These statistics demonstrate that more research into East Texas juries may be warranted to validate the common negative perception, although such a study may not be feasible until significantly more patent jury trials occur there.

That is not to say that there are no advantages for a patentee to file in the Eastern District of Texas. For instance, summary-judgment win rates in Eastern District patent cases are among the lowest in the country and the proportion of cases going to trial is among the highest. These metrics are not in and of themselves unfair or biased, because jurors, on average—both nationally and in the Eastern District—favor the patentee. Notwithstanding these metrics, there are other factors that should benefit the plaintiff, the defendant, and the general public in litigating patent cases in the Eastern District of Texas. The local patent rules in East Texas provide structure and a default schedule for the efficient, effective, and more predictable administration of patent cases. There are particular judges in the Eastern District of

94. *See supra* Part II.A.

95. *See supra* Part II.B.

Texas that have an affinity for, and deep experience with, patent cases, and the case assignment scheme is designed to get patent cases to those judges. This also may provide for a more efficient resolution of patent cases. Further, the results may be more accurate than the average district, as suggested by the Eastern District's relatively high appellate-affirmation rates.

The Eastern District of Texas has certainly been a popular destination for patent cases, and it remains so for now. There are many possible factors that combine to explain its popularity, as we have shown in this article. Before unfairly criticizing the District or its juries, we urge a careful and scientific analysis as opposed to imposing judgment based primarily on lore and anecdote.